BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Courts Below.

The verdict of the jury and the judgment of the court pursuant thereto were rendered on June 6, 1942 (R. 9-10). The opinion of the Supreme Court of Utah is set forth at R. 103-117, is not yet reported in the Utah reports, but appears at 142 Pac. (2d) 649.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked.

The judgment of the Supreme Court of Utah was rendered on October 25, 1943 (R. 117). Petition for rehearing was denied on December 27, 1943 (R. 117). Petition for writ of certiorari was filed on March 18, 1944. The judgment of the Supreme Court of Utah is based upon its application of the United States statute commonly called the Federal Employers Liability Act, 45 U. S. C. Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. Sec. 350.

Statement of the Case.

Bruner, an experienced engine hostler and hostler's helper (R. 16, 20), recovered judgment for $30,000.00 against the Railroad under the Federal Employers Liability Act on account of the loss of his right leg below the knee resulting from an accident in the course of his employment as hostler helper in Grand Junction, Colorado, on December 1, 1940 (R. 1-8). Bruner and his boss (R.

27, 91), Hostler Colosimo, were coaling two engines at the coal chute (R. 33). The engines were headed East, No. 1182 in the lead and No. 1149 in the rear (R. 28, 31). They were coupled together (R. 27). The coupling and relative positions of the two engines are shown in Exhibit 3 (R. 62A, admitted in evidence R. 62), and on Appendix A of this brief. The coal chute and track are shown on Exhibit B (R. 36A, admitted in evidence R. 37), and Exhibit E, (R. 40A, admitted in evidence R. 40).

Prior to the engines being moved to the coal chute Colosimo and Bruner discussed the movements to be made and the work to be done by each of them upon the engines (R. 31). Bruner knew that the engines were to be removed to the coal chute and that Colosimo would coal 1149 and Bruner would coal 1182 (R. 31). Colosimo moved the two engines, using the power of 1149, to the coal chute and spotted 1149 under the chute for coal loading (R. 82). While Colosimo was placing the coal in 1149 Bruner checked the fire in 1182 (R. 52-54). Having checked the fire in engine 1182 when the two engines were stopped, Bruner's next duty was to get to the top of the tender of 1182 in order to spot it at the coal chute and put coal into it (R. 41).

Colosimo, who was boss (R. 27, 91), told Bruner, who understood that he must do as Colosimo told him (R. 27), to stay on 1182 and coal it after Colosimo had coaled 1149 (R. 81). Bruner nevertheless, without telling Colosimo, dismounted from 1182, walked to the back of its tender and attempted to cross over the draw bars between the two engines for the purpose, as he himself testified, of getting on top of the tender of 1182 (R. 41). As Bruner was crossing over the draw bars Colosimo started the engines and Bruner was thrown to the tracks where the wheels of 1182 passed over his leg (R. 41). There is no evidence, suggestion or contention in the record that Colosimo knew that Bruner was between the engines.

As is more particularly shown in the argument, Bruner, who was in the cab of 1182, had several safe ways to get to the top of the tender of 1182 to spot and coal it without clambering over the draw bars or even dismounting from the engine. Bruner did not avail himself of any safe course, but chose to clamber over the draw bars without benefit of steps or handholds. In that precarious position a slight movement of the engine dislodeged him (R. 41).

On appeal to the Supreme Court of Utah the Railroad assigned as error (R. 103) that the court improperly instructed the jury in Instruction No. 6 (R. 11) that Bruner was not guilty of contributory negligence and that the court in Instructions 9 (R. 11, 12) and 20 (R. 12) improperly instructed the jury in failing to tell them to make proportionate deductions in damages if they found that Bruner was guilty of contributory negligence. The Supreme Court of Utah disposed of these assignments by reaching the conclusion as matter of law that Bruner was not guilty of contributory negligence (R. 107).

The Railroad also assigned as error (R. 108) that Instruction No. 6 (R. 10-11) improperly instructed the jury that Bruner was within the protection of two safety rules and that the court improperly instructed the jury in regard to safety rules not involved in the case. Those rules were as follows:

Safety Rules, Sec. 2057, provided:

> Engine bell or whistle warning must be given before engines are moved, then wait at least one minute.

Section 30 provided:

> The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade.

The Utah Court stated (R. 108) that this Court considered the latter of these two rules in *Owens* v. *U. P. R. Co.*,

319 U. S. 715, 87 L. Ed. 1221, 63 S. Ct. 1271, but did not decide whether or not it was applicable to yard movements. The Utah Court stated that there was considerable doubt that these rules had any application to the case at bar, but disposed of the Assignment of Error by holding that it was not prejudicial error in any event because the Railroad was guilty of negligence as matter of law (R. 108).

Thus the Supreme Court of Utah has held as matter of law that on the evidence introduced the Trial Court would have been justified in peremptorily instructing the jury, thus eliminating those issues from the trial by jury, that the Railroad was guilty of negligence and that Bruner was not guilty of contributory negligence.

Specification of Errors.

The Supreme Court of Utah erred in holding as matter of law that Respondent was not guilty of contributory negligence.

The Supreme Court of Utah erred in holding as matter of law that Petitioners were guilty of negligence.

ARGUMENT.

I.

The majority opinion of the Supreme Court of Utah erred in holding as matter of law that respondent was not guilty of contributory negligence.

The majority opinion of the Utah Court at R. 105 states:

> * * * In order for the plaintiff to take coal on Engine 1182 it was necessary for him to be on top of the tender. There were several methods by which he could have climbed there. *At the point where he was standing at the rear of the north side of the tender there was no ladder leading to the top of the tender.* However, immediately across from this point on the rear of the

south side of the tender there was such a ladder. *To reach this ladder there were at least two direct methods he could have used.* One would have been to cross over the pilot (a flat platform on the front of the engine) on Engine 1149. The other way, the way he chose to go, was to climb over the draw bar between the two engines which were coupled together.

* * * It was the plaintiff's duty to get on top of the tender on Engine 1182. *He chose a manner of getting there which is not shown by the evidence to be either unusual or dangerous.* In fact, the only evidence is that which he gave that he had often used this route and that it was a common practice among yardmen to do to. (R. 106)

* * * *While it may be, as defendants argue in their brief, that the manner chosen was highly dangerous, there is no evidence to show this. We must conclude that the record does not show contributory negligence.* (R. 106-107) (Italics added)

The majority opinion of the Utah Court, when it reached the question of whether Bruner chose an unusual and dangerous way of getting on top of the tender of Engine 1182, placed Bruner at the rear of the north side of the tender. After so placing him, it points out that there was no ladder at that corner leading to the top of the tender and concludes that it was therefore necessary for him to cross from the north side to the south side. But Bruner did not start from the rear of the north side of the tender. He came to that point only enroute from the cab of Engine 1182 to the top of the tender (R. 41). There was no reason for Bruner to be on the north side of the engine or at the rear of the north side of the engine. He was in the cab of the engine when his duty required him to get to the top of the tender (R. 41).

At the time the two engines commenced backing from the sand house to the coal chute Bruner was on the south

running board of Engine 1182 (R. 31-32). Bruner then moved back along the south running board through the door into the cab of the engine and when the engine stopped he was in the cab of Engine 1182 (R. 41, 60). Being in the cab of the engine when it stopped he checked the fire, (R. 41), his next duty was to get to the top of the tender of 1182 in order to take coal from the coal chute (R. 41).

There were five different ways for him to reach his objective.

First. Without dismounting from the engine he could have moved straight back from the cab climbing up the coal gate of the tender, which is directly back of the gangway. (R. 99). This was the most direct and easiest way of reaching his objective.

At R. 100, Colosimo testified as follows:

> A. Yes sir. Some of them—they have so many ways of working—*some of them crawl up over the gates and get into them.*

For the better understanding of the court there is set forth in Appendix A a rough sketch illustrative generally of Engine 1182 with its tender, coupled to Engine 1149, and marked thereon by different types of lines are the various methods of moving from the cab to the tender. This sketch is not in evidence. It is illustrative of the situation involved which is established by the evidence. The solid black line marked No. 1 shows the direct route back from the cab up the coal gate on to the top of the tender.

Second. without dismounting from the engine he could move from the cab through the door leading to the running board and thence over the top of the cab to the tender. It was customary practice for enginemen to move from the running board over the cab on to the tender. At R. 85 Colosimo testified as follows:

> Q. How did the hostler's helper get onto the tank

to take coal on that front locomotive, after moving from the sand house?

A. Most of them are over the cab into the tender.

Q. How do they get over the cab?

A. They climb up on the boiler and just step right up on the cab there.

This second method, although more circuitous than the first, did not involve dismounting from the engine. In Appendix A it is shown by the dotted line marked No. 2.

Third. Bruner could have dismounted from the engine on the engineer's side, which was the same side on which the ladder going up the rear of the tank is placed, walk back on the ground along the right side of the engine to the ladder, climb the ladder on to the tender.[1] This was not as easy as the first or second methods, but it did not involve dismounting from the engine on the wrong side and then crawling over the draw bar. The third way is shown on Appendix A by the line of dashes marked No. 3.

Fourth. The fourth way, and that chosen by Bruner, was to dismount from the engine on the left side, which is the side away from that on which the ladder goes up the back of the tank, walk back along the wrong side of the engine to the north rear corner and then clamber over the draw bar. This course is shown on Appendix A by the line of crosses marked No. 4.[2] It was only after he chose this way and reached the north rear corner of the tank that he came enroute to the place where the majority opinion of the Utah Court places him when it describes his choice of routes preliminary to its conclusion that his choice was neither unusual nor dangerous.

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[1] As shown on the rough sketch, this ladder is nearer the center of the rear of 1182 than it is in fact, as shown on Exhibit A (R. 34A, introduced in evidence R. 34), and Exhibit F, (R. 74A, introduced in evidence R. 74).

[2] The line of crosses on this rough sketch can be seen through the tender of 1182, indicating Bruner's movement on the north or left hand side of 1182.

Fifth. Even after reaching the rear of the tender on the north side and deciding to cross thru two live engines, Bruner had a perfectly safe way open to him, as is shown by Exhibit 3 (R. 62A, introduced in evidence at R. 62). This was to mount the step on the north side of the pilot of Engine No. 1149, step up to the pilot deck, take hold of the circular handhold around the front of the boiler of 1149, cross the deck, step down to the footstep on the south side, step across to the south footstep at the rear of the tender of 1182 and climb up the ladder at the rear of 1182. Exhibit 3 clearly shows all of this. The front of 1149 is designed for such a maneuver, as shown by the circular handhold. The rear of 1182 is not so designed, as is shown by the absence of a horizontal handhold. This way is shown on Appendix A by the line of alternate crosses and dashes marked No. 5.

It is true that Bruner could, within the realm of reason, choose his course, but that choice should not be a capricious, whimsical or outrageous choice. It is elementary in the law of principal and agent that although an agent may have latitude in choice of methods, yet he may not choose an outrageous method. If he does and it is dangerous, he is guilty of negligence. It is well established that it is negligence for an agent to chose a dangerous way of doing a thing when safe ways are open to him. *Atlantic Coast Line R. Co.* v. *Davis,* 279 U. S. 34, 73 L. Ed. 601, 49 S. Ct. 210.

The evidence shows that Bruner chose an unusual and dangerous way. Exhibit A. (R. 34A) shows the rear end of the tender of Engine No. 1182. The distance between the rails on which it stands is four feet eight and one-half inches, standard gauge. It can be seen from the picture that the tender overhangs the rail approximately two feet on each side. The ladder on the right hand side overhangs the right hand rail. The only handhold for Bruner to use

in mounting from the ground on the left hand side to the cross beam is vertical and extends downward to the left of the left rear corner of the tender of 1182. The distance from that handhold to the ladder is apparently between five and six feet.

It can be seen from Exhibit F (R. 74A) that there is no horizontal handhold crossing from the ladder, on the right, to the vertical handhold on the left, designed for the use of men crossing over the draw bar or on the cross beam. The only horizontal handhold on the rear of the tender of 1182 is that which is shown on Exhibits A and F (R. 34A and 74A) crossing immediately above the cross beam. There are two rods shown crossing immediately above the cross beam. The lower one is the rod which controls the pin lift lever. (R. 61) Immediately above that is the handhold provided for trainmen standing on the footsteps at the rear of 1182 (61-62).

It is not clear from Bruner's testimony whether he moved from the north to the south side by moving along the cross beam immediately under the pin lift lever rod, shown on Exhibit A (R. 34A) and Exhibit F. (R. 74A), or by crawling over the draw bar from one footstep to the other at the rear end of the tender of 1182. Examination of Exhibits 3, A and F (R. 62A, 34A and 74A) will demonstrate that either way is awkward, clumsy and dangerous. Also they disclose that such movement is not contemplated by the design of the safety appliance handholds.

Inspection of Exhibit 3 (R. 62A) shows that Bruner's evidence, that it is common practice to move from one side of 1182 to the other along the cross beam, is ridiculous and not entitled to serious consideration. It can be seen from Exhibit 3 that there is very little space, certainly not enough for a human foot clothed in a shoe to rest on that beam between the handhold and the rear end of the tank. It can be seen that a person attempting to move across that beam

would be entangled in the pin lift lever rod and the handhold. It is evident that it would be a most clumsy, awkward and dangerous movement. It cannot be contended that, in moving across on the cross beam, safety can be secured by holding on to the handhold provided for men riding the footsteps of 1182. A man attempting so to do would be leaning over in a position such that his hands would be just above his feet.

If Bruner's evidence means that he crawled over the draw bar from one footstep to the other, Exhibits 3, A and F show also that it was awkward, clumsy and dangerous. The draw bar would be almost waist high. It is also quite wide. Such a crossing is obviously not contemplated by the design of the safety appliance handholds. Handholds are provided wherever railroad men are supposed to hold on to prevent that very result. If Engine 1182 had been designed with the intention that trainmen would cross from the left hand side to the right hand side, along the cross beam, there would have been a horizontal handhold at a suitable height to hold on to while so doing. Inspection of all of the pictures in evidence shows handholds wherever trainmen are supposed to hold on engines. Thus Exhibit 1 (R. 56A) shows the handhold along the boiler to support enginemen moving on the running boards. The front of Engine 1182 shown on Exhibit 1 shows a handhold around the circumference of the front of the boiler and also a handhold across the pilot. Exhibit F shows a handhold at the right rear corner of the tank and at the left rear corner of the tank and a horizontal handhold running across the tank immediately above the cross beam. There is, however, no horizontal handhold shown across the top of the tank at a height designed to be used by a man moving across the rear of the tank. And the Safety Appliance Act and Rules and Regulations do not prescribe any such handhold.

It is submitted that Exhibits 3, A and F furnish the required evidence and show that it was unusual and dangerous for Bruner to cross either along the cross beam or clamber over the draw bar, and that the evidence demonstrates that Bruner chose a dangerous way when safe ways were available and thus under the law announced by this Court there was substantial evidence from which the jury would have been justified in finding that Bruner was guilty of contributory negligence.

II.

The majority opinion of the Supreme Court of Utah erred in holding that petitioners were guilty of negligence as matter of law.

The majority opinion at R. 110 concludes that the evidence on negligence is such that the trial court could have directed a verdict for plaintiff. If there is evidence from which the jury could find that Colosimo instructed Bruner to stay on the engine and that it was Bruner's duty to obey, then it cannot be said as matter of law that Colosimo owed Bruner the duty to anticipate that Bruner would disobey that order and that Colosimo's failure so to do constitutes negligence. It is submitted that there was such evidence.

Colosimo was in charge of the activities of Bruner. He was the boss (R. 27). Bruner recognized that. At R. 27 he said:

> Q. Who is the boss?
>
> A. The hostler, always, with the hostler helper. The hostler helper has to do whatever the hostler tells him to do.
>
> Q. You may state whether or not you worked under the direction of Mr. Colosimo during this shift?
>
> A. Yes, whatever he told me to do, that is what I did, and my business to do.

At R. 50 he said:

> Q. That was a part of your duties?
> A. My duty was to do whatever he told me to.

At R. 81 Colosimo testified as follows:

> I told him for him to sand 1182 *and stay on her and coal her,* and at the same time I would take care of the 1149.

He also testified at R. 102 as follows:

> A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149.

On recross examination Colosimo testified as follows:

> By Mr. Black:
>
> Q. All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?
> A. Yes sir (R. 102).

Can it be said that merely because Colosimo on recross examination testified that all he meant was that Bruner would take care of 1182 negatives the plain meaning of what he told Bruner? Colosimo told Bruner to stay on 1182 and coal it. Bruner's counsel asked Colosimo what he meant. Of course, what he meant by the words he spoke is immaterial. The material thing is the normal meaning of the words. The Utah Court used Colosimo's statement as to what he meant to render completely impotent the ordinary meaning of what he said and concluded that therefore as a matter of law Colosimo did not direct Bruner to stay on the engine (R. 106). Bruner himself did not take this view of the evidence that Colosimo directed him to stay on the engine, because he denied that Colosimo so instructed him (R. 70-71). Thus there was a conflict in the evidence as to

whether Colosimo instructed Bruner to stay on the engine. Colosimo said "Yes". Bruner said "No". The holding of the majority opinion of the Utah Court is that even though the jury might find that Colosimo did say, "*stay on the engine and coal it*", this should be taken by Bruner to mean only "*coal it*" because on cross examination Colosimo said that was all he meant and, therefore, the jury should not be permitted to find that it meant anything else.

This attributes to Colosimo's statement the effect of an admission by defendants. It is as if the court reasoned, "Colosimo states that what he said meant only, 'coal it', therefore defendants are bound by it." This is unwarranted. No foundation was laid constituting Colosimo's statement an admission.

The majority opinion attributes to the failure of Colosimo to give a signal the same absolute liability that the statute attributes to a failure to comply with the requirements of the safety appliance law such as a failure to have a handhold or footstep or power brakes, etc. But with rare exception it is for the jury to say whether certain conduct is not up to the standard of an ordinarily prudent person and therefore negligence.

Tiller v. *Atlantic Coast Line R. Co., supra;*
Bailey v. *Central Vermont Ry., Inc., supra;*
Owens v. *Union Pacific R. Co., supra;*
Brady v. *Southern Railway Co., supra.*

As shown, the jury could have found that Colosimo told Bruner to stay on 1182 and coal it. Also, as shown under I, Bruner could get from the engine to the top of the tender without getting off the engine. He could have "stayed on the engine" and also "coaled it."

It is submitted that this evidence alone should preclude holding that defendants were guilty of negligence as matter of law.

Conclusion.

Petitioners pray that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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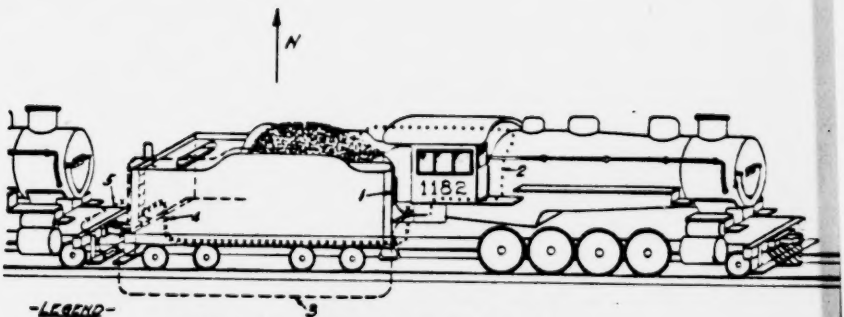
Appendix - A



-LEGEND-

1. Straight back from cab, up coal ladder to top of tender.
2. Through front door of cab, over top of cab, to top of tender.
3. Dismount from cab to ground on engineers side, walk to rear of tender and climb ladder on engineers side to top of tender.
4. Dismount from cab to ground on firemans side walk to rear of tender, climb over the draw bars to engineers side and climb ladder to top of tender.
5. Same as No 4 except across the pilot platform of No 1149 instead of over the drawbars.